IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 978

MARY K. RYAN, Assignee, *Petitioner,*

v.

JACK VICKERS, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

1. There is no jurisdiction to entertain the petition, for no federal question was presented or decided in the State courts below.

Petitioner's assertion that jurisdiction exists under 28 U.S.C. 1257(3) is completely unfounded. At no stage in the proceedings below did petitioner raise the claim made in the petition—that she was deprived of property in violation of the due process clause of the Fourteenth Amendment of the Constitution of the United States—or any other federal question. And, since no federal question was raised, none was considered or decided by the Colorado courts below.

The baseless nature of petitioner's jurisdictional claim is perhaps best illustrated by the statement (Pet. p. 5) that: "The trial court itself raised the federal question sought to be reviewed by its judgment of dismissal." However, the trial court's opinion and judgment (Pet., App. D) does not discuss or pass on any federal question or right. The same is true of the other materials relied upon by petitioner as showing jurisdiction. In none of them is there any reference to, let alone consideration of, the Constitution, statutes or treaties of the United States or of any right claimed thereunder. See the excerpts from petitioner's brief in the Supreme Court of Colorado (Pet., App. C), the opinion of the Supreme Court of Colorado (Pet., App. A), and the petition for rehearing (Pet., App. E), all of which are equally silent on any federal right or question.*

In short, petitioner wholly failed to "specially set up" or claim any right under the Constitution, laws or treaties of the United States in the state court proceedings below, and no such right was considered or decided in those proceedings. Accordingly, petitioner's attempt to raise a federal question for the first time in her petition to this Court comes too late. Stern and Gressman, *Supreme Court Practice* (3d ed., 1962), pp. 99-100.

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* The only other thing cited by petitioner in support of jurisdiction is that she presented oral argument in the Supreme Court of Colorado "to the same point" (Pet. p. 6). Since that argument is not part of the record filed with this Court, it cannot be used to establish that a federal question was raised. *Lynch* v. *New York*, 293 U.S. 52, 54. In any event, it is clear from the documents cited by petitioner, particularly the opinion of the Supreme Court of Colorado, that nothing said in argument "to the same point" suggested, let alone properly raised, a federal question.

2. In any event, nothing is presented warranting review.

This is an action brought by petitioner in the State courts of Colorado for breach of a contract relating to certain properties in West Virginia. It was dismissed by the Colorado courts below on the ground that respondent was excused because of a mutual mistake—the mistake being that the parties believed that a landlord's lien which petitioner's assignor had under the statutes of West Virginia was entitled to first priority when, in fact, it was subordinate to a claim of the Small Business Administration, as the United States District Court for the Southern District of West Virginia, following the decision of this Court in *Small Business Adm'n* v. *McClellan,* 364 U.S. 446, determined in foreclosure proceedings. In so holding—and in rejecting petitioner's contentions that there was no mistake, or that if there was a mistake, it related to a legally inconsequential matter which did not excuse respondent—the Colorado courts below applied familiar principles in resolving this private controversy. No new principles of general application or public importance were laid down, and nothing was done in conflict with the decisions of this Court.

The contentions urged by petitioner here—that instead of a mistake there was a "retrospective" change in the law and that the decisions below "are probably not in accord with the probable intention of this Court" in *McClellan, supra*—are without substance. In 1945, long before the contract in question here, this Court held in *United States* v. *Waddill Co.,* 323 U.S. 353, that the claims of the United States took priority over the lien of a landlord under the statutes of Virginia, which are the same in all material respects as the statutes of West Virginia under which the landlord's lien of

petitioner's assignor was derived.* And in *McClellan* this Court simply held that the Small Business Administration, as a Government entity, was entitled to the priority of the United States. Accordingly, as the United States District Court for the Southern District of West Virginia determined in the foreclosure proceedings, the landlord's lien of petitioner's assignor did not have priority over the claim of the Small Business Administration, and, in relieving respondent because of the mistaken belief of the parties that the landlord's lien was entitled to first priority, the Colorado courts below did nothing which was either "retrospective" or not in accord with *McClellan*.

What petitioner is really complaining of are the West Virginia foreclosure proceedings which established the subordinate character of her assignor's lien. However, apart from the fact that this complaint has no substance, it is foreclosed, no appeal having been taken from the foreclosure proceedings, and it cannot be urged as a basis for reviewing the decisions of the Colorado courts below.

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* Compare §§ 5521, 5522 and 5523 of the Code of Virginia (1942) (now §§ 55-229, 55-230 and 55-231 of the Code of Virginia (1950) with §§ 37-6-11, 12 and 13 of the West Virginia Code Annotated (1961).

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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